BEST AVAILABLE COPY

LIST OF PARTIES

The State of Missouri is the Petitioner in this cause because it seeks review of an interlocutory appeal by the Missouri Court of Appeals, Southern District. The State of Missouri was the appellant before the Court of Appeals. Kurt Zancauske is the respondent. He had been charged by the State of Missouri with the Class C felony of burglary in the second degree.

QUESTIONS PRESENTED

1. Does the Supreme Court of the United States have jurisdiction under 28 U.S.C. Sec. 1257 where a final order has not been rendered because the case involves the appeal of an interlocutory order?

2. Does the Supreme Court have jurisdiction under 28 U.S.C. 1257 where a final order has not been rendered by the highest state court where a decision may be had?

TABLE OF CONTENTS

	Page
List of Parties	i
Questions Presented	ii
Table of Contents	iii
Table of Authority	iv
Opinions Below	1
Jurisdictional Statement	2
Constitutional Provision Involved	2
Statutory Provisons Involved	2
Statement of the Case	3
Reasons for Denying the Writ	8
I. The Supreme Court of the United States does not have jurisdiction in this case because, for the Supreme Court to have jurisdiction under 28 U.S.C. sec. 1257, a final judgment or decree has not been rendered because this case involves the appeal of an interlocutory order.	8
II. The Supreme Court of the United States does not have jurisdiction in this case because, under 28 U.S.C. sec. 1257, a final order has not been rendered by the highest state court in which relief may be had.	10
Conclusion	12

TABLE OF AUTHORITIES

	Page
Cases:	
Chapman v. California, 405 U.S. 1020 (1972).....	8,9
Cohen v. Beneficial Loan Corp., 337 U.S. 541, (1949)..	8,9
Miranda v. Arizona, 384 U.S. 436 (1966).....	3
State v. Reed, 770 S.W.2d 517 (Mo.Ct.App. 1989).....	8
State v. Zancauske, 804 S.W.2d 851 (Mo.Ct.App. 1991)..	1,2,3,4,7
Constitutional Provisions:	
Amend. V, U.S. Constitution.....	2
Statutes and Rules:	
28 U.S.C. sec. 1257.....ii,iii,8,10	
MO.REV.STAT. sec. 547.200.1(3), .3 (1986).....	3,4,7,8
MO.REV.STAT. sec. 569.170 (1986).....	2,3
United States Supreme Court Rule 13.1.....	10
Missouri Supreme Court Rule 83.07.....	10

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

STATE OF MISSOURI

Petitioner,

vs.

KURT ZANCAUSKE,

Respondent.

Petition for Writ of Certiorari to the
Missouri Court of Appeals, Southern District

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

On March 7, 1991, the Missouri Court of Appeals, Southern District, affirmed an order of the trial court suppressing respondent's alleged statements to sheriff's deputies in the case styled State of Missouri v. Kurt Zancauske, No. 17,115. The opinion is now reported at State v. Zancauske, 804 S.W.2d 851 (Mo.Ct.App. 1991), and has been reproduced in its entirety in Appendix A of the State of Missouri's Petition for a Writ of Certiorari.

JURISDICTIONAL STATEMENT

The State of Missouri seeks review of the decision of the Missouri Court of Appeals, Southern District, issued on March 7, 1991. State of Missouri v. Zancauske, 804 S.W.2d 851 (Mo.Ct.App. 1991).

Petitioner cannot request jurisdiction under 28 U.S.C. sec. 1257(3). The Supreme Court of the United States does not have jurisdiction in this case because a final order has not been rendered by the highest state court in which relief may be had.

CONSTITUTIONAL PROVISION INVOLVED

Amendment V, U.S. Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

The statute under which the respondent was charged, MO.REV.STAT. sec. 569.170. (1986), is set forth in full

under Appendix B of the State of Missouri's Petition for Writ of Certiorari. The statute authorizing the State to appeal from the trial court's order sustaining the respondent's pre-trial Motion to Suppress, MO.REV.STAT. sec. 547.200 (1986), is set out, in pertinent part, in Appendix C of the State of Missouri's Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

A. Procedural History

The respondent, Kurt Zancauske, was charged by an information filed in the Circuit Court of Phelps County, Missouri, 25th Judicial Circuit, with burglary in the second degree in violation of MO.REV.STAT. sec. 569.170 (1986). State v. Zancauske, 804 S.W.2d 851, 852 (Mo.Ct.App. 1991). Prior to his scheduled trial, the respondent filed a motion seeking to suppress certain written statements he had made to deputy sheriffs at the Phelps County Sheriff's Department during questioning at that office which took place on March 14, 1989. Id., 804 S.W.2d at 852.

Following an evidentiary hearing, the trial court sustained the motion, ruling that the sheriff's deputies were required to have advised the respondent of the rights afforded him by Miranda v. Arizona, 384 U.S. 436 (1966). Id. The trial judge sustained the Motion to Suppress because, among other reasons, a suspected accomplice, who was being questioned seperately but simultaneously by the same sheriff's deputies, had implicated the respondent in

the burglary and stealing. State v. Zancauske, supra, 804 S.W.2d at 854.

The State perfected an interlocutory appeal pursuant to MO.REV.STAT. sec. 547.200 (1986), and on March 7, 1991, the Missouri Court of Appeals, Southern District, upheld the trial court's order suppressing the respondent's statement. 804 S.W.2d at 851, 852. On March 15, 1991, Special Prosecutor Edward D. Hoertel filed a nolle prosequi in the Circuit Court of Pulaski County.

B. Statement of Facts

On March 14, 1989, Deputy Michael Barnes of the Phelps County Sheriff's Department asked the respondent Kurt Zancauske to come to the Phelps County Sheriff's Department. (T.3) The respondent complied, as did Joseph Dvorak. (T.3) The respondent and Dvorak had been working together, felling and hauling timber adjacent to property owned by Nolan Dunlap. (T.75)

After the respondent and Joe Dvorak both arrived at the Sheriff's Department, they were seperated. Deputy John Blair testified that at that point in time, that respondent was considered a suspect in a burglary of a cabin on the Dunlap property. (T.10,11) Defendant was placed in the deputy's room of the Phelps County Sheriff's Department. (T.3) The deputy's room in the Sheriff's Department is in the back of the building, which has two front exits. (T.5,6) To go from the deputy's room to the west exit, the respondent would have had to walk down a hallway;

to leave from the east exit, respondent would have had to walk past the dispatcher's room, at which a member of the Phelps County Sheriff's Department is stationed. (T.5,6)

Respondent was questioned by Deputy Sheriff Michael Barnes and John Blair at the same time. (T.6) Initially, respondent denied any knowledge of a break-in of a cabin on the Dunlap property. (T.7) Co-defendant Joe Dvorak also initially denied any knowledge of the break-in. (T.12) The deputy sheriffs then went back to the co-defendant, who confessed to a break-in and implicated the respondent. (T.12) When the deputies returned to respondent in the deputy's room, they told respondent that the co-defendant had just confessed to breaking into the cabin on the Dunlap property. (T.12)

Respondent then wrote out a statement admitting he had been on the Dunlap property, had gone up to the cabin, and had looked in the cabin's windows. (L.F.29) In the written statement, respondent denied entering the cabin or taking anything from it. (L.F.29) After the deputy sheriffs told respondent that it would be best if the cabin's owner got his property back, the respondent indicated he would try to get the property back to the owner. (T.63) Respondent also orally admitted that he had gone into the building. (T.4)

Deputy Sheriff John Blair told respondent before the questioning began that respondent was free to leave no matter how the interview came out. (T.4) However, respondent remained at

the Phelps County Sheriff's Department for an hour and a half. (T.16) Respondent did not leave the Sheriff's Department before having made a written statement. At trial, the State stipulated that at no time on or before March 14, 1989, was respondent advised that he had the right to remain silent or to secure counsel. (T.13)

Respondent filed a motion to suppress any written statements allegedly made by defendant. (L.F.53,54) The hearing on this motion was conducted on August 13, 1990. (T.1) The Court, having heard the testimony of former Deputy Sheriff John Blair, sustained respondent's motion to suppress the written, but not the oral, statements allegedly made by respondent. (T.19-21)

The jury was then brought back into the courtroom, and sworn in. Evidence was heard from two State's witnesses, Nolan Dunlap and Joseph Dvorak. (T.24-53) The third witness for the State's case-in-chief was John Blair, the former deputy sheriff who had testified at the hearing on the motion to suppress written statements made by respondent. When John Blair began to testify as to the questioning of respondent at the Phelps County Sheriff's Department, counsel for respondent objected. (T.59)

The Court having sustained the objection, the State requested that John Blair's testimony be heard outside the presence of the jury as an offer of proof. (T.59) After direct and cross-examination, respondent requested that any written or oral

statements allegedly made by respondent be suppressed on the grounds that respondent had not been advised of his rights. (T.68) The Court sustained respondent's motion. (T.68)

The State of Missouri filed an interlocutory appeal pursuant to MO.REV.STAT. sec. 547.200 (1986). The Court of Appeals affirmed the trial court's decision to suppress written statements allegedly made by the respondent. State v. Zancauske, 804 S.W.2d 851, 859 (1991). In addition, the Court of Appeals ruled that the State of Missouri could not appeal the suppression of any oral statements allegedly made by the respondent because MO.REV.STAT. sec. 547.200 (1986) only granted the State of Missouri the right to appeal pre-trial evidentiary rulings. 804 S.W.2d at 852.

REASONS FOR DENYING A WRIT

I. THE SUPREME COURT DOES NOT HAVE JURISDICTION IN THIS CASE BECAUSE A FINAL JUDGMENT OR DECREE HAS NOT BEEN RENDERED BECAUSE THIS CASE INVOLVES THE APPEAL OF AN INTERLOCUTORY ORDER.

The State of Missouri is not permitted to appeal any decision of a trial court unless such ability has been conferred by statute. State v. Reed, 770 S.W.2d 517, 519 (Mo.Ct.App. 1989). Missouri Revised Statutes sec. 547.200.1(3) allows the State to appeal "from any order or judgment the substantive effect of which results in...[s]uppressing evidence." An appeal under this statute is an interlocutory appeal. MO.REV.STAT. sec. 547.200.3 (1986).

The Supreme Court of the United States cannot assert jurisdiction in this case because an interlocutory appeal is not a final order. The Supreme Court's jurisdiction to review decisions of state courts may only include "[f]inal judgments or decrees..." 28 U.S.C. sec. 1257. Where a trial court suppressed evidence because the court had not conducted a hearing to determine whether evidence was obscene, and the court of appeals reversed the trial court's decision and remanded for trial, and the state supreme court denied a hearing, the United States Supreme Court denied certiorari because the order was not final. Chapman v. California, 405 U.S. 1020 (1972).

Finality of orders is determined by a practical, rather than a technical, construction. Cohen v. Beneficial Loan Corp., 337

U.S. 541, 546 (1949). One consideration is whether a "significant question of fact or law remains for trial..." Chapman v. California, 405 U.S. at 1020. If significant questions remain, then in the interest of judicial economy it makes little sense to decide an interlocutory matter, only have to the matter again appealed after another trial. Id.

In this matter, significant questions do remain. The statements sought to be introduced by petitioner were not the only evidence sought the state to be introduced at trial. The state also introduced the testimony of two deputy sheriffs who investigated the case, the alleged victim of the burglary, and the respondent's alleged co-defendant. In fact, enough significant questions of law and fact remained at trial that the state proceeded to try the case against respondent, and did not request that the trial be stayed pending the appellate court's decision on the admissibility of respondent's alleged statements.

Respondent anticipates that if this Court reverses the decision of the Missouri Court of Appeals, Southern District, then the case will be retried. Although the State of Missouri field a nolle prosequi with respect to the charge of burglary in the second degree, the charge could be refiled. Counsel for respondent believes this case would be retried because of the State of Missouri's persistence in seeking to have the statements admitted. If petitioner is again tried on these same charges,

then the question of the admissibility of these alleged written statements will most likely be grounds for relief in a Motion for New Trial and subsequent appeal. This Court may then again be asked to rule on the admissibility of the statements the state seeks to have introduced.

B. THE SUPREME COURT ALSO DOES NOT HAVE JURISDICTION IN THIS CASE BECAUSE A FINAL ORDER HAS NOT BEEN RENDERED BY THE HIGHEST STATE COURT WHERE A DECISION MAY BE HAD.

The United States Supreme Court cannot assert its jurisdiction on a writ of certiorari unless a final judgment or decree has been rendered by "the highest court of a state in which a decision could be had..." 28 U.S.C. sec. 1257. In petitioner's jurisdictional statement, counsel for petitioner states that he claims jurisdiction under 28 U.S.C. sec. 1257(3) and Rule 13.1 of the United States Supreme Court. Rule 13.1 allows a party to seek review of a judgment of a lower state court which is subject to discretionary review by the state court of last resort, but only after the state court of last resort has denied discretionary review.

If a party wishes to transfer a case to the Missouri Supreme Court for review of an appellate decision, that party must, among other things, send a copy of any application for transfer to all parties. Supreme Court Rule 83.07. Respondent's counsel has not received any copy of application for transfer to the Missouri Supreme Court from either the Missouri Office of the Attorney

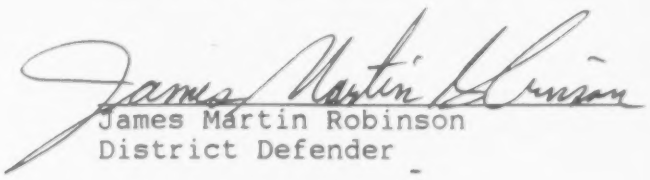
General or the Prosecutor of Phelps County, Missouri. In addition, petitioner's counsel has not received any notice from the Missouri Supreme Court that transfer in this case was denied.

Petitioner explains his failure to request the Missouri Supreme Court to review this decision by explaining that "it is highly unlikely that a motion for discretionary review addressed to Missouri Supreme Court would have been successful." Petitoner's Petition for a Writ of Certiorari at 16 n.3, State of Missouri v. Zancauske, No. 90-1879. In addition, counsel also explains that the Missouri Attorney General's Office did not motion for discretionary review because at the time the case was being handled by Special Prosecutor Edward D. Hoertel. Id. Neither reason removes the State of Missouri's responsibility, whether represented by a special prosecutor or the Missouri Attorney General's Office, from presenting a final order or decree from the highest state court in which a decision could be had to the United States Supreme Court for review.

CONCLUSION

For the reasons stated herein, the State of Missouri's Petition for a Writ of Certiorari to the Missouri Court of Appeals, Southern District should be denied.

Respectfully submitted,



James Martin Robinson
District Defender

L.M. Unterreiner
Attorney of Counsel
401 N. Rolla, Suite 1
Rolla, Missouri 65401
(314) 368-2260

Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the
foregoing document upon the attorney of record in the
cause by mailing a true copy thereto to the attorney of record
his business address as disclosed by the pleadings of record
herein with postage fully prepaid and by depositing same in the
United States mails at Rolla, Missouri, this 14th
day of January, 1976.

James Martin Robinson

BEST AVAILABLE COPY